Pollution Control Industries of Indiana *and* United Steelworkers of America, AFL–CIO–CLC and Employee Committee, Party in Interest. Cases 13–CA–31894, 13–CA–31924, 13–CA–32031, 13–CA–32048, 13–CA–32078, and 13–CA–32207

February 24, 1995

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS STEPHENS AND COHEN

On August 30, 1994, Administrative Law Judge Frank H. Itkin issued the attached decision. The Respondent and Rayford T. Blankenship filed exceptions and supporting briefs. The General Counsel filed an answering brief to the Respondent's exceptions. The Respondent filed a motion to reopen the record and receive further evidence on the issue of remedy. The General Counsel filed a response in opposition to the Respondent's motion, and the Respondent filed a reply in support of its motion.[1] Rayford T. Blankenship filed a motion to strike a section of the General Counsel's brief in response to the Respondent's exceptions, and the General Counsel filed a response to the motion.[2] The General Counsel filed a motion opposing Blankenship's filing of exceptions to the judge's decision.[3]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[4] and conclusions and to adopt the recommended Order.[5]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Pollution Control Industries of Indiana, East Chicago, Indiana, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

[1] The Respondent urges the Board to receive further evidence on the propriety of the order to restore its tank cleaning operations. The General Counsel argues that the Respondent's motion should be denied because the Respondent had an opportunity to present evidence on this issue at the hearing and has not demonstrated that additional evidence is newly discovered or was unavailable at the hearing. We find merit in the General Counsel's contention. Accordingly, we deny the Respondent's motion to reopen the record.

[2] Blankenship's motion refers to the section of the General Counsel's brief which argues in support of the judge's admission of transcripts of Blankenship's speeches to unit employees. We deny Blankenship's motion as lacking in merit. Apart from the reasons stated by the judge for admission of the transcripts, we note that Blankenship admitted at the hearing that the transcripts were an accurate account of statements he made to unit employees at two meetings held before the election. Thus, Blankenship stated that the transcripts were those which he had submitted to the General Counsel during the investigation of the charges in this proceeding as evidence to rebut the allegations that certain statements made by him violated Sec. 8(a)(1) of the Act.

[3] The General Counsel's motion is denied in the circumstances of this case where Blankenship participated in the hearing in which allegations concerning his conduct as an agent of the Respondent were litigated.

[4] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[5] The parties are free to introduce at the compliance stage of this proceeding any evidence relevant to the appropriateness of the restoration and reinstatement portions of this Order, provided that such evidence was not available at the time of hearing on the unfair labor practices alleged and found in this decision. See *We Can, Inc.*, 315 NLRB 170 (1994), and *Lear Siegler, Inc.*, 295 NLRB 857 (1989).

Librado Arreola and *Howard Malkin, Esqs.*, for the General Counsel.
Rayford Blankenship, John Panico, and *Steven LePage*, for the Respondent.
Singleton, Crist, Patterson, Austgen & Lyman, Esqs., for the Respondent.
DeWitt Walton, Esq., for the Charging Party.

DECISION

FRANK H. ITKIN, Administrative Law Judge. Unfair labor practice charges and amended charges were filed in the above proceedings on July 30, August 16, September 27, October 7 and 25, and December 17 and 21, 1993. An amended consolidated complaint and a separate complaint and an order further consolidating the above cases issued on January 6, 24, and 31, 1994, respectively. The complaints were further amended at the hearing. The General Counsel alleged in Cases 13–CA–31894, 13–CA–31924, 13–CA–32031, 13–CA–32048, and 13–CA–32078 that Respondent Employer violated Section 8(a)(1) of the National Labor Relations Act by, inter alia, threatening employees with discharge, layoffs, closing of its facility, loss of their incentive program, loss of their pay raises and benefits, and other reprisals because of their union and protected concerted activities; by creating an impression among its employees that their union and protected concerted activities were under surveillance; by coercively interrogating employees about employee union and protected concerted activities; and by telling its employees that it would be futile for them to select the Union as their collective-bargaining representative.

The General Counsel further alleged that Respondent Employer violated Section 8(a)(1) and (3) of the Act by discriminatorily delaying the granting of pay raises to its employees; by discriminatorily discharging employee Jimmy Brooks; by discriminatorily discontinuing its tank cleaning operation, subcontracting the work of its tank cleaning oper-

ation, and discharging its tank cleaning crew employees;[1] by later discriminatorily discharging tank cleaning crew employee Joe Aldaz; and by discriminatorily suspending and then discharging employee Larry Henderson. In addition, the General Counsel also alleged that Respondent Employer violated Section 8(a)(1) and (5) of the Act by failing and refusing to bargain in good faith with the Union, as the exclusive collective-bargaining agent of an appropriate unit of its employees,[2] by unilaterally and without prior notice subcontracting its tank cleaning crew operation and discharging its tank cleaning crew employees.

The General Counsel alleged in Case 13–CA–32207 that Respondent Employer further violated Section 8(a)(1) of the Act by issuing a memorandum to its employees threatening to discontinue all pay raises and other benefits pending contract negotiations with the Union. In addition, the General Counsel also alleged that Respondent Employer violated Section 8(a)(1) and (2) of the Act by creating an ''employee committee'' to deal with the Employer concerning wages, hours, and other terms and conditions of employment; by establishing policies and procedures and participating in the affairs and meetings of the ''employee committee''; by rendering assistance and support to the ''employee committee'' by paying employee representatives to the ''employee committee'' for time spent at ''employee committee'' meetings; and by recognizing and bargaining with the ''employee committee'' as the collective-bargaining representative of its employees in the above appropriate unit.

And, finally, the General Counsel alleged that Respondent Employer violated Section 8(a)(1) and (5) of the Act by failing and refusing to bargain in good faith with the Union by bypassing the Union and dealing directly with its employees in the above unit by negotiating with the ''employee committee'' concerning terms and conditions of employment; and by unilaterally and without prior notice implementing the following changes in terms and conditions of employment for its unit employees: Changing its policy requiring employees to clock in and out prior to using toilet facilities; requiring all employees to pass a new literacy test; granting employees 1 day off with pay for each 90-day period an employee would work without being absent for sick leave, without any safety writeup, and without being tardy more than once while working a full 40-hour regular time workweek; reducing the total weekly work hours required of employees from 58 to 56 hours; adding ''grandparents'' to the list of relatives the death of whom made an employee eligible for funeral leave; and increasing the employees' ''monthly bonus pot'' by $100 if more than 30 employees were to share in the ''bonus pot.''

Respondent Employer, in its answers, as discussed below, admitted and denied various allegations of the amended consolidated complaints. Accordingly, a hearing was held on the issues raised on June 13, 14, and 15, 1994, in Chicago, Illinois. On the entire record thus made, including my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

Respondent Employer is engaged in the recovery and recycling of fuels at its facility in East Chicago, Indiana, and is admittedly engaged in commerce as alleged. Charging Party Union is admittedly a labor organization as alleged. On September 3, 1993, a majority of the Employer's employees in an appropriate unit[3] selected the Union in a Board-conducted representative election as their exclusive collective-bargaining agent. On December 2, the Union was certified by the Board as the exclusive collective-bargaining agent of the unit employees. The Union admittedly has been the exclusive collective-bargaining agent of the above unit employees since September 3, 1993. See G.C. Exhs. 1(t), 1(y), and 1(gg).

Further, it is admitted that the Employer, in opposing the Union's attempt to represent its employees, engaged in the following conduct (see G.C. Exhs. 1(t), 1(y), and 1(gg)): The Employer, by its agents and supervisors, during late July, August, and early September 1993, threatened employees with discharge because of their activities on behalf of the Union; threatened employees with the closing of its facility because of their activities on behalf of the Union; threatened employees with the closing of its facility and discharge because of their activities on behalf of the Union; threatened employees with discharge if the Union became the bargaining representative of the employees; threatened employees with the loss of their incentive program because of their support for the Union; threatened employees with plant closure and discharge if the employees continued their support of the Union; threatened employees with the loss of their pay raises because of their support for the Union; threatened employees with the closing of its facility if the Union organized the employees; threatened employees with layoffs because of all their activities concerning the Union; created the impression among its employees that their union activities were under surveillance by the Employer; interrogated various employees about employee union sympathies and activities; and threatened employees with reprisals if they continued to wear hats with union insignia.

It is further admitted (see G.C. Exhs. 1(t), 1(y), and 1(gg)) that the Employer, by its agents and supervisors, about October 28, 1993, created at its facility an ''employee committee'' to deal with the Employer concerning wages, hours, and other terms and conditions of employment; and from about November 1 to December 3, 1993, established policies and procedures and participated in the affairs and meetings of the ''employee committee,'' rendered assistance and support to the ''employee committee'' by paying representatives to the ''employee committee'' for time spent at ''employee committee'' meetings, and recognized and bargained with the ''employee committee'' as the collective-bargaining representative of its employees in the above unit. In addition, it is similarly admitted that the Employer, from about November 1 to December 3, 1993, bypassed the Union and dealt directly with its unit employees by negotiating with the

[1] The discriminatorily discharged tank cleaning crew employees, as alleged, include Ernesto Irezarry, Cornell Jude, Michael Kelly, Mark Markusic, Jose Osorio, Joseph Peterson, Miguel Ramos, and Rene Rios.

[2] The appropriate bargaining unit, as alleged, consists of:

> All full time and regular part time production and maintenance employees, including laborers, equipment operators, and environmental technicians employed by the Employer at its facility presently located at 4343 Kennedy Avenue, East Chicago, Indiana; but excluding office clerical employees, professional employees, guards and supervisors as defined in the Act.

[3] See fn. 2, supra.

''employee committee'' concerning terms and conditions of employment.

Further, it is admitted (see G.C. Exhs. 1(t), 1(y), and 1(gg)) that the Employer discharged employee Jimmy Brooks about August 10, 1993; discontinued its tank cleaning operation, subcontracted the work of its tank cleaning operation, and discharged eight tank cleaning crew employees (named in fn. 1, supra) about September 8, 1993; discharged tank cleaning crew employee Joe Aldaz about September 10, 1993; and suspended employee Larry Henderson about September 28 and discharged the employee about October 1, 1993. And, at the hearing (see Tr. 11–12), the Employer also admitted implementing the following changes in terms and conditions of employment for its unit employees: About October 1993, it changed its policy with respect to requiring employees to clock in and out prior to using the toilet facilities; about November 1, 1993, it granted employees 1 day off with pay for each 90-day period an employee would work without being absent for sick leave, without any safety write-up, and without being tardy more than twice while working a full 40-hour regular time workweek; about November 1, 1993, it reduced the total weekly hours of work required of employees from 58 to 56 hours; and about November 14, 1993, it increased the monthly bonus pot by $100 if more than 30 employees were to share in the bonus pot.

Joseph Peterson, one of the Employer's terminated tank crew employees (see fn. 1, supra), explained that his job duties included cleaning ''rail cars'' at the Employer's facility and ''tanks'' at a customer's facility. (See Tr. 107 to 109.) He testified that Pollution Control did not previously notify him ''that it was doing away with the tank crew.'' He recalled that he had ''receive[d] notice that [September 9, 1993] was [his] last day'' on ''September 9, after [he] punched out.''

See General Counsel's Exhibit 5, a notice from the Employer to the tank crew employees, dated September 8, 1993, stating:

> We regret to inform you that we have decided to discontinue the tank cleaning operation. Therefore, as of today, September 8, 1993, you will be terminated.
>
> . . . .
>
> You will receive one week two days severance pay. If you have any vacation pay coming you will also receive that, plus if you turn in your uniforms on Friday you will also receive your deposit.
>
> This will be given to you on Friday September 10, 1993.
>
> Thank you for your dependable service.

See also General Counsel's Exhibit 10 and transcript 255 to 257.

Joseph Aldaz, a tank crew employee discharged about September 10, 1993, also related his duties in cleaning ''cars'' and ''tanks'' for the Employer. (See Tr. 116 to 118.) He went on ''vacation'' on September 3 (the day of the Board-conducted representation election) and, when he returned on September 10, he received the above notification of his termination. (See G.C. Exh. 5.[4])

Arturo Cadena, employed by Respondent, testified that he ''was given a test in December 1992'' and ''January 1993'' involving ''math, English and reading''; ''if you did not pass the test you were not hired.'' He was not then told that he would be ''retested'' later. However, on November 2, 1993, after the Board-conducted representation election, he was apprised by management that ''if you didn't pass [this] test you are going to be laid off or you have to go back to school.'' ''It was another literacy test'' instituted for all the employees.

Mark Markusic, one of the terminated tank crew employees, similarly explained how he ''would clean out rail cars'' at the Employer's premises and ''storage tanks'' away from the Employer's premises. See Tr. 76 to 81. ''Right after the [representation] election,'' as Markusic testified, he was given and wore at work a union hat with the Steelworkers' name on it. His coworkers in the ''tank crew'' also wore these union hats. He had never observed ''other PCI employees,'' ''other than the tank crew,'' ''wear Union hats and paraphernalia.'' Earlier, before the Board-conducted representation election, Company Supervisor Jesus Bautista (also appearing in the transcript as Jesse Batista) had the following conversation with him at work about the Union:

> He [Bautista] told me that if PCI did get the Union in . . . the tank crew wouldn't have nothing to do with the Union because the tank crew wasn't employed by PCI. . . . I [Markusic] told him if I wasn't employed by PCI, how come I wear a PCI uniform and my paychecks are drawn by PCI every week.

See also the related coercive statements and conduct admittedly engaged in by the Employer's supervisors and agents, including Bautista, as summarized above.

Larry Henderson testified that he started working for the Employer in March 1991; he worked on the ''loading dock'' during July 1993; his job duties there included taking ''samples,'' ''hooking up trucks,'' and ''opening and closing valves''; and his supervisor at the time was Mike Gray. Henderson was chiefly instrumental in initiating the Union's organizational campaign at the Employer's facility during 1993. He ''talked with everybody; everybody was for it; so [he] contacted the Union.'' The Union thereafter held ''meetings'' with the employees which he attended. He signed a union membership card, distributed such cards to his coworkers at home and at work, and received signed cards from his coworkers. He had received from his coworkers some 32 signed union membership cards in a unit of approximately 36 employees. Later, on September 3, Henderson served as ''observer'' for the Union and signed the tally of ballots during the Board-conducted representation election, which the Union won by a vote of approximately 34 to 2.

The Employer, in opposing this union organizational drive, in addition to the admitted coercive statements and conduct summarized above, held two meetings with the unit employees prior to the September 3 Board-conducted representation election. As Henderson testified, the Employer's officials and its admitted agent Rayford Blankenship were present at these meetings. Blankenship and associates represented the Employer in this proceeding. Blankenship addressed the employ-

[4] Aldaz also recalled, with reference to the alleged discriminatory discharge of employee Larry Henderson (discussed below), that a forklift operator named David Moreno had driven his forklift ''through a 55 gallon drum'' containing a ''chemical'' resulting in a ''spill,'' and ''continued to work the next day.''

ees at both meetings and his ''associate'' tape recorded his comments.[5] In addition, as Henderson further noted, he also had received a $1-an-hour pay increase ''a couple of weeks before the election.''

Henderson next recalled that there had been ''two major spills'' of solvents or chemicals by his coworkers at the Employer's facility in 1992, and the employees involved in the ''spills'' had not been terminated. However, on September 28, 1993, Henderson was suspended and later discharged by the Employer because he had been involved in a ''spill.'' Henderson testified:

> Q. What happened that day?
>
> A. There was a spill in our area which involved me, Wayne [Squire, also spelled Schweider in the record,] and [Supervisor] Michael [Gray].
>
> Q. How did the spill occur?
>
> A. There were two trucks on the dock. One needed to be loaded and off-loaded and the engine was running. Mike Gray was in between the trucks. Me and Wayne Squire were by the desk and Mike [Gray] said open it up. At the time I thought that he meant the dome. So Wayne [Squire] went up to the top of the tank and opened the dome . . . and then Wayne [Squire] came back by the desk . . . and Mike [Gray] said open it up . . . and Mike [Gray] had the hose in his hand, he took the cap off the hose and the water just spilled out.
>
> Q. Do you recall how long the water was squirting out . . . ?
>
> A. I think it went for about a minute.
>
> Q. And what kind of liquid was it that spilled out?
>
> A. It was F-series water . . . they say it is non-hazardous water.
>
> Q. Compared with the two other major spills . . . earlier, was this amount of liquid that was spilled near to those spills?
>
> A. No.

Supervisor Gray then apprised Henderson that ''he had to send [Henderson] home.'' Safety Director Frank Johnny, at the time, also spoke to Gray, Squire, and Henderson and took statements concerning the incident.

Henderson punched out, as instructed, and went home. He was later telephoned by Director Johnny and told that he was ''suspended until an investigation could be done.'' Henderson went back to the Employer's facility that same day and again spoke with Director Johnny. Johnny again apprised Henderson that he ''was suspended until an internal investigation could be done.'' On the next day, Henderson telephoned the Employer and was apprised by Director Johnny that ''they were not done with the investigation.'' Henderson ''kept calling'' and was ultimately told by Kevin Prunski, the chairman of the Employer's board of directors, that he was ''fired because of the spill''; ''it was very unsafe and they couldn't have that.'' Wayne Squire, also involved in the ''spill,'' was not ''discharged'' and in fact was permitted to return to work ''two days later.'' See also General Counsel's Exhibits 11 and 12, ''Employee Warning Reports,'' issued to other employees involved in ''spills.''

[5] See Tr. 182–194, and G.C. Exhs. 7 and 8, discussed further infra.

On cross-examination, Henderson acknowledged signing on December 18, 1992, a receipt for Respondent's ''Employee Handbook.'' The employee handbook provides, inter alia, that ''habitual absenteeism or tardiness'' and ''violation of safety rules or practices'' ''may result in disciplinary action or discharge.'' See R. Exhs. 4 and 12. Henderson admittedly had received ''warnings for excessive absenteeism'' and ''violating safety practices'' from the Employer. Respondent's Exhibit 13 contains ''Employee Warning Reports'' assertedly issued to Henderson. According to Respondent's Exhibit 13, Henderson was given a warning on January 1, 1993, because he ''was a no show'' and ''did not call in.'' He was given a warning on April 13 for not having ''safety glasses'' and a ''respirator.'' He was given a warning on July 10 ''for leaving work before notifying supervisor'' with a ''three day suspension.'' He was given a warning on August 25 for ''unauthorized absence and attendance'' with ''one week off,'' a ''30 day probation'' and reference to possible ''termination.'' He claimed that he ''was not suspended for five days'' and had ''told them a day ahead of that time that I would be off that day.'' He was given a warning on September 3 because of his ''attendance.'' He was given a warning on September 8, because he had ''no safety glasses over an open drum.'' He was given a warning on September 14 for failing ''to wear protective clothes . . . while taking a sample from a tanker with hazardous material.'' He was given a similar ''safety'' warning on September 22. Henderson explained that he did not receive various cited warnings and disputed their accuracy.

In addition, Respondent's Exhibit 14 contains Respondent's ''Employee Absence/Late/Early Quit Reports'' for Henderson. Compare Respondent's Exhibit 41, Henderson's ''time cards'' during the above time period. According to Respondent's Exhibit 14, on March 24 and April 29, 1993, he was assertedly a ''late arrival.'' On May 5 he was a ''late arrival'' and ''absent.'' On May 13 he was ''absent.'' On June 7 he was a ''late arrival.'' On June 21 he was a ''late arrival.'' On June 25 he was a ''late arrival.'' On July 10 he ''left site without notifying supervisor.'' On August 5 he ''called in and said he will be late'' and ''called back and said he [was] not coming in.'' On August 24 he was ''absent'' having ''called in at 12:37.'' He was a ''late arrival'' on August 26. He took an ''early quit'' on September 7. On September 8 he was ''absent'' ''sick.'' On September 14 he was a ''late arrival.'' On September 27 he ''called that he will be late'' because he '' took his daughter to hospital.'' He explained that he had not received or seen various of these cited reports. He also observed that ''everybody at PCI had attendance problems.''

Jimmy Brooks testified that he started working for the Employer in August 1991; that he ''operated the dry shredder'' and also ''worked in the tail pits''; and that his supervisor was Mike Kurec. The Union's organizational drive at the Employer's facility started about June 1993. Brooks attended two union organizational meetings and signed a union membership card. He ''did not pass out any cards or talk to anybody about the Union.''

Later, on August 9, as Brooks recalled,

> When I came to work, I changed, and I went to my foreman and told my foreman that I wasn't feeling too well . . . . And he said that if you are sick . . . just

> go home. I said are you sure because I don't want any trouble. He said yes . . . I will tell just tell them that you are sick and went home. So, I went home.

Brooks did not ''punch in that day.'' On the following morning, August 10, he ''returned to work . . . on time and ready to work.'' He was then told to ''see'' Company Safety Director Frank Johnny. There, Johnny and he had the following conversation:

> He [Johnny] asked me what happened yesterday, and I [Brooks] told him that the foreman sent me home. He said okay let me go out in the yard and verify that. . . . He came back, and when he came back I asked him did he talk to [the foreman] and he said yes. Then after that he said hold on, let me make a call, so he told me to step out of his office. . . . Then he got off the phone and he came back and told me I'm sorry; they got their mind made up; we are going to have to let you go.

Brooks assertedly was never ''told by any supervisor'' that if he was ''absent from work too much'' he ''would be fired.''

On cross-examination, Brooks acknowledged that he too had signed a receipt for a copy of Respondent's Exhibit 4, the Respondent's employee handbook, on December 18, 1992. The employee handbook, as noted, provides, inter alia, that ''habitual absenteeism or tardiness'' ''may result in disciplinary action or discharge.'' Brooks claimed that he ''didn't understand this.'' In addition, Respondent's Exhibit 1 contains ''Employee Absence/Late/Early Quit Reports'' for employee Brooks. According to these records, Brooks was absent on April 14, 1993, when he ''called in and said he will be late, but [was a] no show.'' He was absent on April 28, because he was ''sick.'' He was absent on April 29 and ''went to the Hospital'' with ''bronchitis.'' He was ''late'' on May 6 without making a ''call.'' He was absent on May 25 and ''called in and said [he] will be late'' but did not ''show.'' He was absent on May 26 and given a 1-day suspension. He was absent on May 27 as a ''no show.'' He was absent on June 3. He was a ''late arrival'' on June 9. He was given ''three days suspension'' for ''safety'' reasons on June 11. He was a ''late arrival'' on June 23. He was absent on June 30. He was a ''no show/no call'' on July 8. He was a ''late arrival'' on July 17 and was given ''five days off.'' He was a ''late arrival'' on July 28 and 30 and ''sent home'' on July 30. And, finally, he was absent on August 9 with his last day of work being August 6. This record shows that he had been ''sick'' and ''sent home.'' Respondent's Exhibit 2 is Brooks' ''Unemployment Compensation Management Separation Record,'' citing ''poor attendance'' as the reason for his ''separation.''

Brooks, when questioned about the above attendance records, asserted, inter alia,

> Any time I didn't come to work I would call ahead of time. The majority of times, if I was off, I had a doctor's excuse.
>
> . . . .
>
> The ones I haven't signed I don't remember.

Brooks could not ''recall'' and then denied ''ever get[ting] a one day suspension.'' He denied various record entries, claiming, inter alia, that ''didn't happen.'' He added: ''I didn't sign all these. These pages without my signature are rumors.'' Brooks testified:

> Q. Does that show that your supervisor gave you five days off because you arrived late again?
>
> A. That is not what happened, no. . . . That is what the document says, but that didn't happen . . . .

Brooks also assertedly had never seen Respondent's Exhibit 2, his ''Unemployment Compensation Management Separation Record,'' citing ''poor attendance'' as the reason for his ''separation.'' He claimed that ''nobody'' had told him that he was ''being terminated for excessive absenteeism.'' He assertedly had never received ''any kind of warnings regarding [his] absenteeism.''

Kevin Prunski, the Employer's chairman of the board, testified that his Company recycles ''discarded chemicals from chemical manufacturers and we make fuel out of it'' at the Company's facility in East Chicago, Indiana. The Employer's operations include ''our drum processing area where we take in the drums from the chemical manufacturers and use that in our fuel.'' According to Prunski, in August 1993, the Employer's ''drum processing'' operation also included its ''tank cleaning operation.'' The tank crew was assertedly ''disbanded'' ''in August 1993.'' The ''decision'' to ''disband'' the ''tank crew'' was made by the Employer's board of directors, including Prunski. Prunski testified:

> Q. Now, after the board made the decision to disband the tank crew, was the Union ever notified of your decision?
>
> A. I believe they were. I don't recall if they were or not. . . .
>
> Q. Did you ever pick up a telephone and call someone at the Union?
>
> A. No, I personally did not.
>
> Q. Did you write any letters to let them know of that decision?
>
> A. No, I did not. No.
>
> Q. Since the tank crew was disbanded, who performs those operations?
>
> A. We have an outside contractor that does it.
>
> Q. Did you enter into a contract with that contractor?
>
> A. No. It is an as needed basis. . . .
>
> Q. Exactly what operation do they perform?
>
> A. Rail cars enter our facility and they may have residue in them which needs to be removed before it can leave our plant, They have their people go on inside of those rail cars using their equipment to vacuum the contents out. . . .
>
> Q. Do they go outside the facility?
>
> A. We do use them if our customers may have a tank cleaned or may need some remedial work.
>
> Q. Is this operation basically the same duties that were performed by the tank crew when they were employed by you?
>
> A. Yes. . . .
>
> Q. Now, when the board made its decision to disband the tank crew, what were some of the underlying reasons?

A. The main reason was our Company was being written about in the local newspaper in regard to safety. These employees were part of the article and indicated that there was a safety problem at our plant. We were very concerned about that and we felt the best thing we could do would be to hire the experts to come in instead of us doing it ourselves. And also at the time . . . there was a great deal of equipment that would have to be purchased to be able to do this process and we could not afford it.[6]

Q. How long was the tank crew in operation before it was disbanded?

A. . . . I believe a year with respect to the cleaning of rail cars.

Q. How long was it in operation in cleaning off site tanks for your customers?

A. Probably since 1988, I believe. . . .

Although Prunski, as noted above, had claimed that the tank crew was ''disbanded'' ''in August 1993,'' it was elsewhere admitted that the Employer had in fact discontinued its tank cleaning operation, subcontracted the work of its tank cleaning operation, and discharged eight tank cleaning crew employees (named in fn. 1, supra) about September 8, 1993, and discharged tank cleaning crew employee Joe Aldaz about September 10, 1993, shortly after the unit employees had selected the Union as their exclusive bargaining agent in a Board-conducted representation election. Prunski admittedly did not ''consult with the Union'' with respect to the ''decision to disband the tank crew.'' Further, Prunski also admittedly had ''made an amendment to our Company policy'' pertaining to including ''grandparents'' in its employee ''funeral leave'' benefit during this same time period. This subject was admittedly ''discussed at an employee committee meeting'' ''after the election.'' Prunski asserted:

We had made an amendment to our Company policy only because in error we failed to put grandparents in there, but that was all that was discussed.

. . . .

We [previously had] considered them [grandparents] to be the same as parents.

Prunski did not ''notify the Union that this change was being made.''

Prunski also admittedly had ''authored'' the following memorandum ''after the Union election'' (G.C. Exh. 2):

To: All Employees
From: Kevin Prunski

All raises and benefits will be on hold pending the contract negotiations with the Steel Workers Union.

In addition, Prunski was asked:

Q. Now, where [sic] you consulted when Larry Henderson was discharged?

A. Yes, I was.

Q. Who brought that to your attention?

A. I believe it was [Safety Director] Frank Johnny that brought it to my attention.

Q. What was the reason for his discharge?

A. There was a number of things in Henderson's file; absenteeism, unsafe practices, just a number of write ups in his file. . . .

Q. What was the straw that broke the camel's back?

A. The straw that broke the camel's back was he had a spill at our plant. . . .

Q. Now, when Frank Johnny approached you about this incident with Larry Henderson, did he make a recommendation to you as to what his fate should be?

A. No, he did not, not that I can recall.

Frank Johnny, previously employed by Respondent Employer as its safety director, identified General Counsel's Exhibit 4 as his signed statement explaining the reason for firing employee Jimmy Brooks during August 1993. General Counsel's Exhibit 4 states:

Jimmy Brooks was separated from Pollution Control Industries of Indiana, Inc., solely for his attendance record.

He was given permission to go home by his supervisor because he was sick After that day, he did not call for three days. He did not let us know if he is coming back to work or not. He did not show up with a doctor's excuse. This is grounds for separation. This was reviewed by the plant manager Bob Moore and myself.

Johnny noted:

According to Company policy . . . if you are sick and don't call, it is a form of separating yourself from the Company. He did not call to let us know if he was coming back to work, or had a doctor's excuse . . . that he would be off of work for any given length of time.

Johnny further noted that Brooks' ''last day of work was August 6''; General Counsel's Exhibit 4 ''was signed on August 9''; and

[after] he [Brooks] came back to start working he was told that he was no longer employed because he did not call in to say which direction he was going to go with the Company.[7]

Johnny, although safety director for the Employer, admittedly was not ''told by any of the managers at Pollution Control that the tank crew would be disbanded'' during Sep-

[6] Prunski elsewhere generally asserted:

We would have had to buy a truck with the cost of between $150,000 and $200,000 and numerous safety equipment, which the total bill would have been in excess of $250,000. At the time, we could not afford it.

[7] As Johnny testified, R. Exh. 1 contains ''Employee Absence/Late/Early Quit Reports'' for employee Brooks. R. Exh. 2 is Brooks' ''Unemployment Compensation Management Separation Record,'' citing ''poor attendance'' as the reason for his ''separation.'' R. Exh. 4 is the Employer's employee handbook noting, inter alia, that ''habitual absenteeism or tardiness'' ''may result in disciplinary action or discharge.'' R. Exh. 5 is Brooks' signed ''receipt'' of his employee handbook, dated December 18, 1992. And R. Exhs. 6 and 7 pertain to the separations of employees David Shane and Michael Howard, respectively, as a consequence of their attendance problems.

tember 1993. And, Johnny, when asked what the ''reason'' was for employee Henderson's subsequent discharge, testified:

> At that particular time there was a spill that he [Henderson] was involved with. If it couldn't be that, I don't know.

Johnny had ''brought'' to Prunski's attention ''the spill'' that Larry Henderson had caused; however, Prunski assertedly did not ''consult with [Johnny] about [Henderson's] discharge.'' Johnny acknowledged that ''there ha[d] been spills'' in the past and he had recommended ''discipline,'' explaining:

> After the investigation sometimes we will give them days off and they will come back to work and have more training.

Johnny had never recommended the ''discharge of any employee . . . involved in a spill.''

Robert Campbell, president and chief executive officer of Respondent Employer, claimed that the ''chemical'' involved in the Henderson ''spill'' was ''hazardous.'' He next claimed that:

> The tank car cleaning [operation] is a separate portion of our business. The business is not very lucrative and therefore our profits were not very good, very high on that. We would have had to put about $300,000 of new equipment and investment into that facility were we to continue to do it ourselves.

He claimed that his board of directors would have subcontracted out the car cleaning operation even ''if there had been no Union'' activity at the facility. Elsewhere, when asked to relate ''what considerations the Employer had when it decided to get rid of the tank cleaning operation,'' he testified:

> I would like to refer to some articles that were written in the Hammond Times in August of 1993. They were very negative about our Company, in particular the safety standards that our Company had, and it made us as managers of the Company more aware of the need to increase the safety equipment and the procedures that we had at our facility.
>
> Most of the employees that were interviewed by the Hammond Times were employees from the tank cleaning crew, and therefore it really exacerbated our attention to the safety requirements of the crew, as I said before, the confined entry [into a tank].
>
> There is automatic equipment available [to do this type of job], but it is extremely expensive and it is not completely reliable. . . . [Ace Power, to whom the unit work was subcontracted,] had better equipment than we did . . . .

John Newell, the Employer's chief financial officer, claimed that he had participated with the members of the Employer's board of directors in determining whether to buy ''tank cleaning equipment.'' He claimed that the Employer ''would have been required to spend . . . approximately $300,000,'' and ''we couldn't and we didn't.'' When asked ''when was the decision made to subcontract the work out,'' he claimed ''around'' September or October 1993. He also identified various Employer records pertaining to the ''separation'' of various employees because of, inter alia, attendance and performance problems. See Respondent's Exhibits 15 through 37 and 39 through 40; and also Respondent's Exhibits 6 and 7. Compare General Counsel's Exhibits 11 through 18.[8]

Discussion

Section 7 of the National Labor Relations Act guarantees employees the ''right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection,'' as well as the right ''to refrain from any or all such activities.'' Section 8(a)(1) of the Act makes it an unfair labor practice for an employer ''to interfere with, restrain, or coerce employees in the exercise of'' their Section 7 rights. The ''test'' of ''interference, restraint, and coercion under Section 8(a)(1) of the Act does not turn on the employer's motive or on whether the coercion succeeded or failed . . . . [t]he test is whether the employer engaged in conduct, which it may reasonably be said, tends to interfere with the free exercise of employee rights under the Act.'' See *NLRB v. Illinois Tool Works*, 153 F.2d 811, 814 (7th Cir. 1946), and *Overnite Transportation Co.*, 296 NLRB 669, 685–687 (1989), enfd. 938 F.2d 815 (7th Cir. 1991).

It is admitted that the Employer, in opposing the Union's attempt to represent its employees, engaged in the following conduct: The Employer, by its agents and supervisors, during late July, August, and early September 1993, repeatedly threatened employees with layoffs, discharge, the closing of its facility, loss of their incentive program, and loss of pay raises; created the impression among its employees that their union activities were under surveillance; interrogated employees about employee union sympathies and activities; and threatened employees with reprisals if they continued to wear hats with union insignia. Such coercive conduct clearly tends to impinge on employee Section 7 rights in violation of Section 8(a)(1) of the Act.

Further, as noted above, the General Counsel alleged that Respondent Employer, by its admitted agent Rayford Blankenship, similarly violated Section 8(a)(1) of the Act by threatening employees with loss of their jobs and other reprisals if they voted in favor of the Union and by telling employees that it would be futile for them to select the Union as their collective-bargaining representative. The undisputed evidence of record (see Tr. 182–194 and G.C. Exhs. 7 and 8) shows that Blankenship, during the Employer's antiunion campaign, apprised the assembled employees, inter alia:

> . . . I'm Ray Blankenship. I'm the senior partner of the firm of Blankenship and Associates. . . . We practice labor law all over the United States. That's why we're here. . . . There are rumors that this Company is about to be sold, that's correct. . . . [Burns Inter-

[8] Much of the evidence summarized above is not controverted. There are, however, some conflicts in testimony and credibility resolutions which must be made. These credibility resolutions will be discussed below with the separate alleged violations of the Act.

> national Security, in a cited case,] walked in and they fired 50 percent of the employees that worked for the [predecessor] company that was union . . . . If that happens here, this Company will have nothing to say about it. It will be entirely the buyer, just like Burns. The Supreme Court said . . . if a company destroys the majority status . . . the company is free to tell the union to take a hike, they don't have to honor the union contract . . . . We do it all the time . . . . A company will call us up and say . . . I want to buy this company . . . I don't wanna be union . . . I want to buy it and I don't want anybody out there to have a union contract or be a member of the union. . . . Hey, we fire the people. . . .
>
> . . . .
>
> . . . Let me show you collective bargaining. . . . If the Union won the election here . . . there is no law in the land that will require this Company or any company to ever sign a contract with any union. The law simply states that a company must meet with a union, not you, at reasonable times and places for purposes of bargaining in good faith. Now, here's a contract as a matter of fact that we negotiated two and a half years, froze the wages on everybody for two and a half years, the president was elated . . . .
>
> . . . .
>
> . . . Listen, I don't want to take up anymore of your time unnecessarily. I wanna just make that one point to you about thinking about what's in your best interest and the best interest of your families. . . . . If Waste Management comes in here . . . and buys the place, I can tell you, if they make the decision to just simply blow the Union away or a Union contract, at least 50 percent of you will be fired . . . . How do you destroy majority status? You get everybody and put them in a pool and say there's a hundred people, I'm gonna fire fifty-one or fifty. They automatically will do it . . . .
>
> . . . .
>
> . . . What is your name . . . Henderson? You work[ed] . . . for another company where the Union closed down, didn't ya? . . . . I thought you did. I thought you worked for a company the Union got in and they sold it out and you lost your job. Is that true or false? . . . . It's false then. OK. I just heard that, I just heard that . . . .
>
> . . . .
>
> . . . If you are purchased by Waste Management or any other company, what's your best chance of working here? Union or non-Union? If the other company make[s] up their min[d] that their going to operate this Company non-Union, what's your best chance of keeping your job here? . . . . Frankly, I don't care what you do. Cause I know what I'm gonna do. Matter of fact, I don't represent Waste Management but I do represent these people and we already know what we 're going to do . . . .

I find and conclude that Blankenship, admittedly an agent of Respondent Employer, violated Section 8(a)(1) of the Act by threatening employees with loss of their jobs and other reprisals if they voted in favor of the Union and by telling employees that it would be futile for them to select the Union as their collective-bargaining representative, as alleged. Assessed in the context of the Employer's admitted coercive and threatening statements and conduct as outlined above, Blankenship, by the above and related statements to the assembled employees, clearly engaged in conduct which further tended to impinge on employee Section 7 rights.

The Employer cannot maintain on this record that Blankenship's statements to the assembled employees were privileged under Section 8(c) of the Act. For, as restated in *Overnite Transportation Co.*, 296 NLRB 669, 685–687 (1989), enfd. 938 F.2d 815 (7th Cir. 1991),

> . . . [An] employer is free only to tell ''what he reasonably believes will be the likely economic consequences of unionization that are outside his control'' and not [make] ''threats of economic reprisal to be taken solely on his own volition'' . . . .
>
> . . . .
>
> . . . [An] employer . . . cannot be heard to complain that he is without adequate guide for his behavior. He can easily make his views known without engaging in ''brinkmanship'' when it becomes all too easy to ''overstep and tumble into the brink . . . .''

This record does not provide any reasonable or legitimate basis for Blankenship's quoted statements to the employees; Blankenship's statements are instead simply more threats of economic reprisal in clear violation of Section 8(a)(1) of the Act.[9]

In addition, Section 8(a)(2) of the Act makes it an unfair labor practice for an employer ''to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support . . . .'' On September 3, 1993, a majority of the Employer's employees in an appropriate unit selected the Union in a Board-conducted representation election as their exclusive collective-bargaining agent. On December 2, the Union was certified by the Board as the exclusive collective-bargaining agent of the unit employees. The Union admittedly has been the exclusive collective-bargaining agent of the above unit employees since September 3, 1993. It is conceded that the Employer, by its agents and supervisors, about October 28, 1993, created at its facility an ''employee committee,'' a labor organization within the meaning of Section 2(5) of the Act, to deal with the Employer concerning wages, hours, and other terms and conditions of employment; and from about November 1 to December 3, 1993, established policies and procedures and participated in the affairs and meetings of the ''employee committee,'' rendered assistance and support to the ''employee committee'' by paying representatives to the ''em-

[9] Counsel for Respondent Employer attacks the reliability of the secondary evidence received in support of the above finding of threatening and coercive statements by its admitted agent Blankenship (Br. 16–17). However, as the record shows (Tr. 182–194 and G.C. Exhs. 7 and 8), the disputed secondary evidence was received because Respondent Employer, represented by Blankenship, had refused to honor an outstanding subpoena for the primary evidence. As restated in *American Art Industries*, 166 NLRB 943, 952 (1967), enfd. in pertinent part 415 F.2d 1223 (5th Cir. 1969),

> If the best evidence which could have been offered on this issue is not before us, responsibility therefor rests with respondent who refused to honor a subpoena by General Counsel for its production . . . .

ployee committee'' for time spent at ''employee committee'' meetings, and recognized and bargained with the ''employee committee'' as the collective-bargaining representative of its employees in the above unit. Respondent Employer, by the above conduct, has admittedly ''dominated and interfered with the formation and administration of, and has been rendering unlawful assistance and support to, a labor organization, in violation of Section 8(a)(1) and (2) of the Act.

Further, Section 8(a)(3) of the Act forbids employer ''discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . . .'' And Section 8(a)(5) of the Act makes it an unfair labor practice for an employer ''to refuse to bargain collectively with the representatives of his employees.'' Section 8(d) of the Act explains that ''to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours and other terms and conditions of employment . . . .'' In *Fibreboard Corp. v. NLRB*, 379 U.S. 203 (1964), the United States Supreme Court, in an opinion by Chief Justice Warren, held:

> [T]he type of ''contracting out'' involved in this case—the replacement of employees in the existing bargaining unit with those of an independent contractor to do the same work under similar conditions of employment—is a statutory subject of collective bargaining under Section 8(d). . . .

In a separate concurring opinion, Justice Stewart noted:

> Analytically, this case is not far from that which would be presented if the employer had merely discharged all its employees and replaced them with other workers willing to work on the same job in the same plant without the various fringe benefits so costly to the company. While such a situation might well be considered a Section 8(a)(3) violation upon a finding that the employer discriminated against the discharged employees because of their union affiliation, it would be equally possible to regard the employer's action as a unilateral act frustrating negotiation on the underlying questions of work scheduling and remuneration, and so an invasion of the duty to bargain on these questions, which are concededly subject to compulsory collective bargaining . . . .

Later, in *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981), the Supreme Court, in an opinion by Justice Blackmun, held:

> We conclude that the harm likely to be done to an employer's need to operate freely in deciding whether to shut down part of its business *purely* for economic reasons outweighs the incremental benefit that might be gained through the union's participation in making the decision . . . and we hold that the decision itself is not part of Section 8(d)'s ''terms and conditions'' . . . over which Congress has mandated bargaining. [Emphasis added.]

The Court, in ''order to illustrate the limits of [its] holding,'' pertinently noted, inter alia, that the ''union [had] made no claim of anti-union animus.'' See also *Dubuque Packing Co.*, 303 NLRB 386 (1991), and cases discussed.

In the instant case, the Employer repeatedly threatened its employees with discharge, layoff, closedown, and related reprisals if they voted for union representation. On September 3, a majority of the Employer's employees in an appropriate unit selected the Union in a Board-conducted representation election as their exclusive collective-bargaining agent. On September 8, the Employer, without any prior notice to or bargaining with the Union, summarily subcontracted out its tank cleaning operation and discharged its nine unit tank cleaning crew employees.[10] I reject as incredible the shifting, vague, incomplete, and essentially unsubstantiated assertions of Company Officials Kevin Prunski, Robert Campbell, and John Newell that, inter alia, ''the main reason'' for this sudden decision, concerning unit work which the Employer had been doing for a considerable period of time, was ''our Company was being written about in the local newspaper in regard to safety''; ''there was a great deal of equipment that would have to be purchased''; ''we could not afford it''; this work ''was not very lucrative''; and ''we would have had to put about $300,000 of new equipment and investment into that facility . . . to continue to do it ourselves . . . .'' I find that these asserted reasons are pretextual and that the Employer, as it had repeatedly warned its employees, was instead promptly retaliating against the unit tank crew, consisting of open and active union supporters, because the employees had chosen union representation.[11]

I find and conclude that the Employer, by subcontracting out this unit work and terminating the nine unit employees in retaliation for their having chosen union representation, violated Section 8(a)(1) and (3) of the Act. Further, I find and conclude the Employer, by this unilateral conduct, also violated Section 8(a)(1) and (5) of the Act. The Employer, by this discriminatorily motivated and unilateral conduct, had replaced the employees in the existing bargaining unit with those of an independent contractor to do the same work under similar conditions of employment, and this is a mandatory subject of collective-bargaining under Section 8(d) of the Act. The Employer had failed to bargain with the Union over its decision and the effects of its decision to subcontract out this unit work.

The Employer similarly ran afoul of Section 8(a)(1) and (5) of the Act by failing and refusing to bargain in good faith with the Union by bypassing the Union and dealing directly with its employees in the above unit by negotiating with the ''employee committee'' concerning terms and conditions of employment; and by unilaterally and without prior notice implementing the following changes in terms and conditions of employment for its unit employees: Changing its policy requiring employees to clock in and out prior to using toilet facilities; requiring all employees to pass a new literacy test; granting employees 1 day off with pay for each 90-day period an employee would work without being absent for sick leave, without any safety writeup and without being tardy

[10] Eight of the unit employees, as noted supra, were discharged about September 8. The ninth, who had been on leave, was discharged about September 10.

[11] Further, I reject counsel for Respondent Employer's additional argument that the Employer would have in any event subcontracted out this unit work for lawful reasons. The credible evidence of record also does not support this assertion.

more than once while working a full 40-hour regular time workweek; reducing the total weekly work hours required of employees from 58 to 56 hours; adding ''grandparents'' to the list of relatives the death of whom made an employee eligible for funeral leave; and increasing the employees' ''monthly bonus pot'' by $100 if more than 30 employees were to share in the ''bonus pot.'' I reject as incredible Kevin Prunski's incomplete and unsubstantiated assertion that

> We had made an amendment to our Company policy [concerning funeral leave] only because in error we failed to put grandparents in there, but that was all that was discussed.
>
> . . . .
>
> We [previously had] considered them [grandparents] to be the same as parents.

I find and conclude instead that the Employer had here too bypassed the Union, the exclusive bargaining agent of its unit employees, with respect to the above mandatory subjects of collective bargaining.

In like vein, the Employer admittedly had threatened employees with the loss of their pay raises because of their support for the Union. Its agent, Blankenship, had made clear to the employees

> Let me show you collective bargaining. If the Union won the election here . . . there is no law in the land that will require this Company or any company to ever sign a contract with any union. The law simply states that a company must meet with a union, not you, at reasonable times and places for purposes of bargaining in good faith. Now, here's a contract as a matter of fact that we negotiated two and a half years, froze the wages on everybody for two and a half years, the president was elated . . . .

And, after the Union had won the election, Kevin Prunski promptly notified the unit employees:

> All raises and benefits will be on hold pending the contract negotiations with the Steel Workers Union.

I find and conclude that this conduct plainly tended to impinge on employee Section 7 rights in violation of Section 8(a)(1) of the Act, as alleged.[12]

Remaining for consideration are the issues of whether or not employees Larry Henderson and Jimmy Brooks were discriminatorily discharged as alleged. Larry Henderson testified that he started working for the Employer in March 1991; he worked on the ''loading dock'' during July 1993; his job duties there included taking ''samples,'' ''hooking up trucks,'' and ''opening and closing valves'' and his supervisor at the time was Mike Gray. Henderson was chiefly instrumental in initiating the Union's organizational campaign at the Employer's facility during 1993. He ''talked with everybody; everybody was for it; so [he] contacted the Union.'' The Union thereafter held ''meetings'' with the employees which he attended. He signed a union membership card, distributed such cards to his coworkers at home and at work, and received signed cards from his coworkers. He had received from his coworkers some 32 signed union membership cards in a unit of approximately 36 employees. Later, on September 3, Henderson served as ''observer'' for the Union and signed the tally of ballots during the Board-conducted representation election, which the Union won by a vote of approximately 34 to 2.

Henderson next recalled that there had been ''two major spills'' of solvents or chemicals by his coworkers at the Employer's facility in 1992, and the employees involved in the ''spills'' had not been terminated. However, on September 28, 1993, Henderson was suspended and later discharged by the Employer because he had been involved in a ''spill.'' Henderson testified:

> Q. What happened that day?
>
> A. There was a spill in our area which involved me, Wayne [Squire] and [Supervisor] Michael [Gray].
>
> Q. How did the spill occur?
>
> A. There were two trucks on the dock. One needed to be loaded and off-loaded and the engine was running. Mike Gray was in between the trucks. Me and Wayne Squire were by the desk and Mike [Gray] said open it up. At the time I thought that he meant the dome. So Wayne [Squire] went up to the top of the tank and opened the dome . . . and then Wayne [Squire] came back by the desk . . . and Mike [Gray] said open it up . . . and Mike [Gray] had the hose in his hand, he took the cap off the hose and the water just spilled out.
>
> Q. Do you recall how long the water was squirting out . . . ?
>
> A. I think it went for about a minute.
>
> Q. And what kind of liquid was it that spilled out?
>
> A. It was F-series water . . . they say it is non-hazardous water.
>
> Q. Compared with the two other major spills . . . earlier, was this amount of liquid that was spilled near to those spills?
>
> A. No.

Supervisor Gray then apprised Henderson that ''he had to send [Henderson] home.'' Safety Director Frank Johnny, at the time, also spoke to Gray, Squire, and Henderson, and took statements concerning the incident.

Henderson punched out, as instructed, and went home. He was later telephoned by Director Johnny and told that he was ''suspended until an investigation could be done.'' Henderson went back to the Employer's facility that same day and again spoke with Director Johnny. Johnny again apprised Henderson that he ''was suspended until an internal investigation could be done.'' On the next day, Henderson telephoned the Employer and was apprised by Director Johnny that ''they were not done with the investigation.'' Henderson ''kept calling'' and was ultimately told by the Employer's chairman of its board of directors, Kevin Prunski, that he

[12] In making the above and related findings, I credit the essentially undisputed testimony of Mark Markusic, Joe Peterson, Joseph Aldaz, and Arturo Cadena as recited above. Their testimony is in significant part mutually corroborative and they impressed me as trustworthy witnesses.

Although the General Counsel has also alleged that the Employer discriminatorily delayed giving pay raises to its employees from July 25 to August 26, 1993, the record does not, in my view, sufficiently support this separate alleged violation, and I would therefore dismiss this allegation.

was ''fired because of the spill''; ''it was very unsafe and they couldn't have that.'' Wayne Squire, also involved in the ''spill,'' was not ''discharged'' and in fact was permitted to return to work ''two days later.''

Former Company Safety Director Frank Johnny, when asked what the ''reason'' was for employee Henderson's subsequent discharge, testified:

> At that particular time there was a spill that he [Henderson] was involved with. If it couldn't be that, I don't know.

Johnny had ''brought'' to Prunski's attention ''the spill'' that Larry Henderson had caused; however, Prunski assertedly did not ''consult with [Johnny] about [Henderson's] discharge.'' Johnny acknowledged that ''there ha[d] been spills'' in the past and he had recommended ''discipline,'' explaining:

> After the investigation sometimes we will give them days off and they will come back to work and have more training.

Johnny had never recommended the ''discharge of any employee . . . involved in a spill.''

Prunski, however, testified:

> Q. Now, where [sic] you consulted when Larry Henderson was discharged?
>
> A. Yes, I was.
>
> Q. Who brought that to your attention?
>
> A. I believe it was [Safety Director] Frank Johnny that brought it to my attention.
>
> Q. What was the reason for his discharge?
>
> A. There was a number of things in Henderson's file; absenteeism, unsafe practices, just a number of write ups in his file. . . .
>
> Q. What was the straw that broke the camel's back?
>
> A. The straw that broke the camel's back was he had a spill at our plant. . . .
>
> Q. Now, when Frank Johnny approached you about this incident with Larry Henderson, did he make a recommendation to you as to what his fate should be?
>
> A. No, he did not, not that I can recall.

I credit the testimony of Henderson as recited above. His testimony, in this respect, was in large part uncontradicted and supported by the admissions of former Safety Director Johnny. And, insofar as the testimony of Henderson conflicts with the testimony of Prunski and Robert Campbell, I am persuaded on this record that the above testimony of Henderson is more complete, trustworthy, and reliable. I reject as pretextual Prunski's shifting and incredible assertion that Henderson was fired because of ''absenteeism'' and ''unsafe practices.'' Indeed, Henderson had been given a $1-an-hour wage increase ''a couple of weeks before the election.'' And, assessed in the context of the Employer's unlawful resort to widespread acts of interference, restraint, coercion, discrimination, and derogation of its bargaining obligation, all plainly calculated to defeat union representation by its employees, I am persuaded here that the real reason for Henderson's suspension and discharge was to get rid of this chief union protagonist, who had served as the Union's observer in the Board-conducted representation election and signed the tally of ballots for the Union.

It is true, as Henderson acknowledged, Henderson had received, inter alia, ''warnings for excessive absenteeism'' and ''violating safety practices'' from the Employer. However, the record indicates that the Employer had significant employee attendance and performance problems, and its treatment of these problems varied and at times appeared lax and permissive. Further, as Henderson credibly testified, Prunski cited only the ''spill'' to Henderson when firing him. Henderson's coworker involved in this ''spill'' was not similarly disciplined. And Johnny, former director of safety, had not recommended discharge for this ''spill,'' could cite no other ''reason'' for this unusual disciplinary action, and acknowledged that he had never recommended the ''discharge of any employee . . . involved in a spill.'' In sum, I find here that Henderson was discriminatorily suspended and discharged in retaliation for his known union activities, in violation of Section 8(a)(1) and (3) of the Act. Moreover, I reject the Employer's assertion to the effect that Henderson would have in any event then been fired for lawful nondiscriminatory reasons. The credible evidence of record does not support this assertion.[13]

The case of employee Jimmy Brooks is different and here I would dismiss the pertinent allegations of the amended consolidated complaints. Jimmy Brooks testified that he started working for the Employer in August 1991; the Union's organizational drive at the Employer's facility started about June 1993; he attended two union organizational meetings and signed a union membership card; and he ''did not pass out any cards or talk to anybody about the Union.'' On August 9, 1993, as Brooks recalled,

> When I came to work, I changed, and I went to my foreman and told my foreman that I wasn't feeling too well . . . . And he said that if you are sick . . . just go home. I said are you sure because I don't want any trouble. He said yes . . . I will tell just tell them that you are sick and went home. So, I went home.

Brooks did not ''punch in that day.'' On the following morning, August 10, he ''returned to work . . . on time and ready to work.'' He was then told to ''see'' Company Safety Director Frank Johnny. There, Johnny and he had the following conversation:

> He [Johnny] asked me what happened yesterday, and I [Brooks] told him that the foreman sent me home. He said okay let me go out in the yard and verify that. . . . He came back, and when he came back I asked him did he talk to [the foreman] and he said yes. Then after that he said hold on, let me make a call, so he told me to step out of his office. . . . Then he got off the phone and he came back and told me I'm sorry; they got their mind made up; we are going to have to let you go.

[13] Counsel for the General Counsel moves in his posthearing brief (Br. 28) to amend the consolidated and amended complaints in this proceeding to further allege that Henderson's earlier ''placement . . . on probation was another violation of Section 8(a)(3) and (1) of the Act.'' This motion is denied as both untimely and involving an issue not sufficiently litigated at the hearing.

Brooks assertedly was never ''told by any supervisor'' that if he was ''absent from work too much'' he ''would be fired.''

On cross-examination, Brooks acknowledged that he had signed a receipt for a copy of Respondent's Exhibit 4, the Respondent's employee handbook, on December 18, 1992. The employee handbook, as noted, provides, inter alia, that ''habitual absenteeism or tardiness'' ''may result in disciplinary action or discharge.'' Brooks claimed that he ''didn't understand this.'' In addition, Respondent's Exhibit 1 contains ''Employee Absence/Late/Early Quit Reports'' for employee Brooks. As these records show, Brooks was absent on April 14, 1993, when he ''called in and said he will be late, but [was a] no show.'' He was absent on April 28, because he was ''sick.'' He was absent on April 29 and ''went to the Hospital'' with ''bronchitis.'' He was ''late'' on May 6 without making a ''call.'' He was absent on May 25 and ''called in and said [he] will be late'' but did not ''show.'' He was absent on May 26 and given a 1-day suspension. He was absent on May 27 as a ''no show.'' He was absent on June 3. He was a ''late arrival'' on June 9. He was given ''three days suspension'' for ''safety'' reasons on June 11. He was a ''late arrival'' on June 23. He was absent on June 30. He was a ''no show/no call'' on July 8. He was a ''late arrival'' on July 17 and was given ''five days off.'' He was a ''late arrival'' on July 28 and 30 and ''sent home'' on July 30. And, finally, he was absent on August 9 with his last day of work being August 6. Respondent's Exhibit 2 is Brooks' ''Unemployment Compensation Management Separation Record,'' citing ''poor attendance'' as the reason for his ''separation.''

Brooks, when questioned about the above attendance records, asserted, inter alia,

> Any time I didn't come to work I would call ahead of time. The majority of times, if I was off, I had a doctor's excuse.
>
> . . . .
>
> The ones I haven't signed I don't remember.

Brooks could not ''recall'' and then denied ''ever get[ting] a one day suspension.'' He denied various record entries, claiming, inter alia, that ''didn't happen.'' He added: ''I didn't sign all these. These pages without my signature are rumors.'' Brooks testified:

> Q. Does that show that your supervisor gave you five days off because you arrived late again?
>
> A. That is not what happened, no. . . . That is what the document says, but that didn't happen . . . .

Brooks also assertedly had never seen Respondent's Exhibit 2, his ''Unemployment Compensation Management Separation Record,'' citing ''poor attendance'' as the reason for his ''separation.'' He claimed that ''nobody'' had told him that he was ''being terminated for excessive absenteeism.'' He assertedly had never received ''any kind of warnings regarding [his] absenteeism.''

Former Company Safety Director Frank Johnny identified General Counsel's Exhibit 4 as his signed statement explaining the reason for firing employee Jimmy Brooks during August 1993. General Counsel's Exhibit 4 states:

> Jimmy Brooks was separated from Pollution Control Industries of Indiana, Inc., solely for his attendance record.
>
> He was given permission to go home by his supervisor because he was sick After that day, he did not call for three days. He did not let us know if he is coming back to work or not. He did not show up with a doctor's excuse. This is grounds for separation. This was reviewed by the plant manager Bob Moore and myself.

Although the testimony of Frank Johnny was at times not the best, I am nevertheless persuaded here that his testimony in this respect is more reliable and trustworthy than the testimony of Jimmy Brooks. Brooks' testimony was at times unclear and incomplete. I was not impressed with his reliability or trustworthiness as a witness. On this record, I do not find a sufficient nexus between Brook's firing and his limited union activities. Rather, as Johnny more reliably explained and the record shows, ''Jimmy Brooks was separated from Pollution Control Industries of Indiana, Inc., solely for his attendance record.''

CONCLUSIONS OF LAW

1. Respondent Employer is engaged in commerce and Charging Party Union is a labor organization as alleged.

2. Respondent Employer has interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed them by Section 7 of the Act in violation of Section 8(a)(1) of the Act, by threatening its employees with layoffs, discharge, the closing of its facility, loss of their incentive program, loss and delay of their pay raises, and related reprisals because of their support of and activities on behalf of Charging Party Union; by creating the impression among its employees that their union activities were under surveillance; by coercively interrogating employees about employee union sympathies and activities; by threatening employees with reprisals if they continued to wear hats with union insignia; and by warning its employees that it would be futile for them to select the Union as their collective-bargaining representative.

3. Respondent Employer has dominated and interfered with the formation and administration of, and has been rendering unlawful assistance and support to, a labor organization in violation of Section 8(a)(1) and (2) of the Act, by creating an employee committee, a labor organization within the meaning of Section 2(5) of the Act, to deal with the Employer concerning wages, hours, and other terms and conditions of employment; by establishing policies and procedures and participating in the affairs and meetings of the employee committee; by rendering assistance and support to the employee committee by paying representatives to the employee committee for time spent at employee committee meetings; and by recognizing and bargaining with the employee committee as the collective-bargaining representative of its employees in the unit described below.

4. Respondent Employer has discriminated in regard to hire, tenure, and terms and conditions of employment to discourage membership in a labor organization, Charging Party Union, in violation of Section 8(a)(1) and (3) of the Act, by discriminatorily discontinuing its tank cleaning operation, subcontracting the work of its tank cleaning operation, and

discharging its tank cleaning crew employees;[14] and by discriminatorily suspending and then discharging employee Larry Henderson.

5. Respondent Employer has failed and refused to bargain in good faith with Charging Party Union, the exclusive bargaining agent of its employees in the appropriate bargaining unit described below, by discriminatorily and without prior notice to and bargaining with Charging Party Union, discontinuing its tank cleaning operation, subcontracting the work of its tank cleaning operation, and discharging its tank cleaning crew employees; by bypassing the Union and dealing directly with its unit employees by negotiating with the employee committee concerning terms and conditions of employment; and by unilaterally and without prior notice implementing the following changes in terms and conditions of employment for its unit employees: changing its policy requiring employees to clock in and out prior to using toilet facilities; requiring all employees to pass a new literacy test; granting employees 1 day off with pay for each 90-day period an employee would work without being absent for sick leave, without any safety writeup and without being tardy more than once while working a full 40-hour regular time workweek; reducing the total weekly work hours required of employees from 58 to 56 hours; adding grandparents to the list of relatives the death of whom made an employee eligible for funeral leave; and increasing the employees' monthly bonus pot by $100 if more than 30 employees were to share in the bonus pot. The appropriate bargaining unit consists of:

> All full time and regular part time production and maintenance employees, including laborers, equipment operators, and environmental technicians employed by the Employer at its facility presently located at 4343 Kennedy Avenue, East Chicago, Indiana; but excluding office clerical employees, professional employees, guards and supervisors as defined in the Act.

6. The unfair labor practices found above affect commerce as alleged.

7. The General Counsel has failed to sufficiently prove the remaining allegations of the amended consolidated complaints and therefore they are dismissed.

REMEDY

To remedy the unfair labor practices found above, Respondent Employer will be directed to cease and desist from engaging in such unlawful conduct and like and related conduct and to post the attached notice. In addition, to effectuate the purposes and policies of the Act, Respondent Employer affirmatively will be directed to restore the status quo ante with respect to its discriminatorily motivated and unilateral subcontracting out of its unit tank cleaning operation, as found unlawful above. Counsel for Respondent Employer argues (Br. 31) that such an order would be ''unduly burdensome.'' I reject this assertion as not supported by the credible evidence of record.[15] Respondent Employer, in retaliation for its employees having chosen union representation, discriminatorily and unilaterally subcontracted out this unit work and discharged the unit employees. There was, however, no written subcontract. Rather, this unit work was admittedly subcontracted out on an ''as needed'' basis. Under the circumstances, restoration of the status quo ante will reasonably effectuate the purposes and policies of the Act and will not create any undue burden on the Employer.

Accordingly, Respondent Employer will be directed to reestablish and resume its unit tank cleaning operation as it existed prior to its conduct found unlawful here; offer immediate and full reinstatement to its unlawfully discharged unit tank crew employees[16] to their former jobs or, in the event their former jobs no longer exist, to substantially equivalent jobs, without prejudice to their seniority or other rights and privileges, and make whole the employees for any loss of earnings they may have sustained by reason of Respondent Employer's unlawful conduct by making payment to them of a sum of money equal to that which they normally would have earned from the date of Respondent's unlawful action to the date of its offers of reinstatement, less net earnings during such period, with backpay to be computed as provided in *F. W. Woolworth Co.*, 90 NLRB 651 (1977), and interest as provided in *New Horizon's for the Retarded*, 283 NLRB 1173 (1987). See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962). Respondent Employer will similarly be directed to offer immediate and full reinstatement to discriminatorily discharged employee Larry Henderson and also make whole this employee with interest, as provided above.

In addition, Respondent Employer will be directed to, on request, bargain in good faith with Charging Party Union as the exclusive bargaining agent for its unit employees and, if an understanding is reached, embody that understanding in a signed agreement. Respondent Employer will be directed to dissolve its unlawfully created employee committee. And Respondent Employer will be directed to, on request, rescind its unlawful unilateral changes in terms and conditions of employment for its unit employees; however, such an order should not be construed as requiring the Employer to cancel any wage increases or other improvements in terms and conditions of employment without a request from the Union. Respondent Employer will be directed to make whole its unit employees by reimbursing them for any wages and benefits they may have lost as a result of such unilateral changes, with interest, in accordance with *Ogle Protection Service*,

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[14] The discriminatorily discharged tank cleaning crew employees include Ernesto Irezarry, Cornell Jude, Michael Kelly, Mark Markusic, Jose Osorio, Joseph Peterson, Miguel Ramos, Rene Rios, and Joe Aldaz.

[15] I have rejected as incredible the shifting, vague, incomplete, and essentially unsubstantiated assertions of Company Officials Kevin Prunski, Robert Campbell, and John Newell that, inter alia, ''the main reason'' for this sudden decision, concerning unit work which the Employer had been doing for a considerable period of time, was ''our Company was being written about in the local newspaper in regard to safety''; ''there was a great deal of equipment that would have to be purchased''; ''we could not afford it''; this work ''was not very lucrative''; and ''we would have had to put about $300,000 of new equipment and investment into that facility . . . to continue to do it ourselves . . . .'' I have instead found that these asserted reasons are pretextual and that the Employer, as it had repeatedly warned its employees, was instead promptly retaliating against the unit tank crew, consisting of open and active union supporters, because the employees had chosen union representation.

[16] The discriminatorily discharged tank cleaning crew employees include Ernesto Irezarry, Cornell Jude, Michael Kelly, Mark Markusic, Jose Osorio, Joseph Peterson, Miguel Ramos, Rene Rios, and Joe Aldaz.

183 NLRB 682 (1970), and *New Horizons for the Retarded*, supra.

Respondent Employer will also be directed to preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order. And Respondent Employer will be directed to expunge from its files any references to the discriminatory discharges of its tank cleaning crew employees and employee Henderson, and notify the discriminatees in writing that this has been done and that evidence of these discriminatory actions will not be used as a basis for future personnel action against them, in accordance with *Sterling Sugars*, 261 NLRB 472 (1982).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[17]

ORDER

The Respondent, Pollution Control Industries of Indiana, East Chicago, Indiana, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Interfering with, restraining, and coercing its employees in the exercise of the rights guaranteed them by Section 7 of the Act in violation of Section 8(a)(1) of the Act, by threatening its employees with layoffs, discharge, the closing of its facility, loss of their incentive program, loss and delay of their pay raises, and related reprisals because of their support of and activities on behalf of United Steelworkers of America, AFL–CIO–CLC; creating the impression among its employees that their union activities were under surveillance; coercively interrogating employees about employee union sympathies and activities; threatening employees with reprisals if they continued to wear hats with union insignia; and warning its employees that it would be futile for them to select the Union as their collective-bargaining representative.

(b) Dominating and interfering with the formation and administration of, and rendering unlawful assistance and support to, a labor organization in violation of Section 8(a)(1) and (2) of the Act, by creating an employee committee, a labor organization within the meaning of Section 2(5) of the Act, to deal with the Employer concerning wages, hours, and other terms and conditions of employment; establishing policies and procedures and participating in the affairs and meetings of the employee committee; rendering assistance and support to the employee committee by paying representatives to the employee committee for time spent at employee committee meetings; and recognizing and bargaining with the employee committee as the collective-bargaining representative of its employees in the unit described below.

(c) Discriminating in regard to hire, tenure, and terms and conditions of employment to discourage membership in the Union in violation of Section 8(a)(1) and (3) of the Act, by discriminatorily discontinuing its tank cleaning operation, subcontracting the work of its tank cleaning operation and discharging its tank cleaning crew employees; and discriminatorily suspending and then discharging employee Larry Henderson. The discriminatorily discharged tank cleaning crew employees include Ernesto Irezarry, Cornell Jude, Michael Kelly, Mark Markusic, Jose Osorio, Joseph Peterson, Miguel Ramos, Rene Rios, and Joe Aldaz.

(d) Failing and refusing to bargain in good faith with the Union, the exclusive bargaining agent of its employees in the appropriate bargaining unit described below, by discriminatorily and without prior notice to and bargaining with the Union, discontinuing its tank cleaning operation, subcontracting the work of its tank cleaning operation, and discharging its tank cleaning crew employees; bypassing the Union and dealing directly with its unit employees by negotiating with the employee committee concerning terms and conditions of employment; and unilaterally and without prior notice implementing the following changes in terms and conditions of employment for its unit employees: changing its policy requiring employees to clock in and out prior to using toilet facilities; requiring all employees to pass a new literacy test; granting employees 1 day off with pay for each 90-day period an employee would work without being absent for sick leave, without any safety writeup, and without being tardy more than once while working a full 40-hour regular time workweek; reducing the total weekly work hours required of employees from 58 to 56 hours; adding grandparents to the list of relatives the death of whom made an employee eligible for funeral leave; and increasing the employees' monthly bonus pot by $100 if more than 30 employees were to share in the bonus pot. The appropriate bargaining unit consists of:

> All full time and regular part time production and maintenance employees, including laborers, equipment operators, and environmental technicians employed by the Employer at its facility presently located at 4343 Kennedy Avenue, East Chicago, Indiana; but excluding office clerical employees, professional employees, guards and supervisors as defined in the Act.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Reestablish and resume its unit tank cleaning operation as it existed prior to its conduct found unlawful here and offer immediate and full reinstatement to its unlawfully discharged unit tank crew employees to their former jobs or, in the event their former jobs no longer exist, to substantially equivalent jobs without prejudice to their seniority or other rights and privileges, and make whole the employees for any loss of earnings they may have sustained by reason of Respondent Employer's unlawful conduct, with interest, as provided in the Board's decision. The discriminatorily discharged tank cleaning crew employees include Ernesto Irezarry, Cornell Jude, Michael Kelly, Mark Markusic, Jose Osorio, Joseph Peterson, Miguel Ramos, Rene Rios, and Joe Aldaz.

(b) Offer immediate and full reinstatement to discriminatorily discharged employee Larry Henderson to his former job or, in the event his former job no longer exists, to a sub-

[17] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

stantially equivalent job without prejudice to his seniority or other rights and privileges, and make whole this employee for any loss of earnings he may have sustained by reason of Respondent Employer's unlawful conduct, with interest.

(c) On request, bargain in good faith with the Union as the exclusive bargaining agent for its unit employees and, if an understanding is reached, embody that understanding in a signed agreement.

(d) Dissolve its unlawfully created employee committee.

(e) On request, rescind its unlawful unilateral changes in terms and conditions of employment for its unit employees; however, this Order should not be construed as requiring the Employer to cancel any wage increases or other improvements in terms and conditions of employment without a request from the Union and make whole its unit employees by reimbursing them for any wages and benefits they may have lost as a result of such unilateral changes, with interest.

(f) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(g) Expunge from its files any references to the discriminatory discharges of its tank cleaning crew employees and employee Henderson and notify the discriminatees in writing that this has been done and that evidence of these discriminatory actions will not be used as a basis for future personnel action against them.

(h) Post at its facilities in East Chicago, Indiana, copies of the attached notice marked ''Appendix.''[18] Copies of the notice, on forms provided by the Regional Director for Region 13, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(i) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER ORDERED that the amended consolidated complaints are dismissed insofar as they allege violations of the Act not specifically found.

[18] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT interfere with, restrain, and coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act in violation of Section 8(a)(1) of the Act, by threatening our employees with layoffs, discharge, the closing of our facility, loss of their incentive program, loss and delay of their pay raises, and related reprisals because of their support of and activities on behalf of United Steelworkers of America, AFL–CIO–CLC; creating the impression among our employees that their union activities were under surveillance; coercively interrogating our employees about employee union sympathies and activities; threatening our employees with reprisals if they continued to wear hats with union insignia; and warning our employees that it would be futile for them to select the Union as their collective-bargaining representative.

WE WILL NOT dominate and interfere with the formation and administration of, and render unlawful assistance and support to, a labor organization in violation of Section 8(a)(1) and (2) of the Act, by creating an employee committee, a labor organization within the meaning of Section 2(5) of the Act, to deal with this Employer concerning wages, hours, and other terms and conditions of employment; establishing policies and procedures and participating in the affairs and meetings of the employee committee; rendering assistance and support to the employee committee by paying representatives to the employee committee for time spent at employee committee meetings; and recognizing and bargaining with the employee committee as the collective-bargaining representative of our employees in the unit described below.

WE WILL NOT discriminate in regard to hire, tenure, and terms and conditions of employment to discourage membership in the Union in violation of Section 8(a)(1) and (3) of the Act, by discriminatorily discontinuing our tank cleaning operation, subcontracting the work of our tank cleaning operation, and discharging our tank cleaning crew employees and discriminatorily suspending and then discharging employee Larry Henderson. The discriminatorily discharged tank cleaning crew employees include Ernesto Irezarry, Cornell Jude, Michael Kelly, Mark Markusic, Jose Osorio, Joseph Peterson, Miguel Ramos, Rene Rios, and Joe Aldaz.

WE WILL NOT fail and refuse to bargain in good faith with the Union, the exclusive bargaining agent of our employees in the appropriate bargaining unit described below, by discriminatorily and without prior notice to and bargaining with the Union discontinuing our tank cleaning operation, subcontracting the work of our tank cleaning operation, and discharging our tank cleaning crew employees; bypassing the Union and dealing directly with our unit employees by negotiating with the employee committee concerning terms and conditions of employment; and unilaterally and without prior notice implementing the following changes in terms and conditions of employment for our unit employees: changing our policy requiring employees to clock in and out prior to using toilet facilities; requiring all employees to pass a new literacy

test; granting employees 1 day off with pay for each 90-day period an employee would work without being absent for sick leave, without any safety writeup, and without being tardy more than once while working a full 40-hour regular time workweek; reducing the total weekly work hours required of employees from 58 to 56 hours; adding grandparents to the list of relatives the death of whom made an employee eligible for funeral leave; and increasing the employees' monthly bonus pot by $100 if more than 30 employees were to share in the bonus pot. The appropriate bargaining unit consists of:

> All full time and regular part time production and maintenance employees, including laborers, equipment operators, and environmental technicians employed by the Employer at its facility presently located at 4343 Kennedy Avenue, East Chicago, Indiana; but excluding office clerical employees, professional employees, guards and supervisors as defined in the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL reestablish and resume our unit tank cleaning operation as it existed prior to our conduct found unlawful in the Board's decision; offer immediate and full reinstatement to our unlawfully discharged unit tank crew employees to their former jobs or, in the event their former jobs no longer exist, to substantially equivalent jobs, without prejudice to their seniority or other rights and privileges, and make whole the employees for any loss of earnings they may have sustained by reason of our unlawful conduct, with interest, as provided in the Board's decision. The discriminatorily discharged tank cleaning crew employees include Ernesto Irezarry, Cornell Jude, Michael Kelly, Mark Markusic, Jose Osorio, Joseph Peterson, Miguel Ramos, Rene Rios, and Joe Aldaz.

WE WILL offer immediate and full reinstatement to discriminatorily discharged employee Larry Henderson to his former job or, in the event his former job no longer exists, to a substantially equivalent job, without prejudice to his seniority or other rights and privileges, and make whole this employee for any loss of earnings he may have sustained by reason of Respondent Employer's unlawful conduct, with interest.

WE WILL, on request, bargain in good faith with the Union as the exclusive bargaining agent for our unit employees and if an understanding is reached embody that understanding in a signed agreement.

WE WILL dissolve our unlawfully created employee committee.

WE WILL, on request, rescind our unlawful unilateral changes in terms and conditions of employment for our unit employees; however, this should not be construed as requiring the Employer to cancel any wage increases or other improvements in terms and conditions of employment without a request from the Union; and make whole our unit employees by reimbursing them for any wages and benefits they may have lost as a result of such unilateral changes, with interest.

WE WILL expunge from our files any references to the discriminatory discharges of our tank cleaning crew employees and employee Henderson and notify the discriminatees in writing that this has been done and that evidence of these discriminatory actions will not be used as a basis for future personnel action against them.

POLLUTION CONTROL INDUSTRIES OF INDIANA